

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Chapter 13
Case No. 04-32843 GFK

Mark R. Smith and
Sandra D. Smith,

Debtors.

NOTICE OF HEARING AND
MOTION FOR RELIEF FROM STAY

1. TCF National Bank ("Movant"), a secured creditor of the Debtors herein, by its undersigned attorney, moves the Court for the relief requested below, and gives notice of hearing herewith.
2. The Court will hold a hearing on this motion at 10:30 o'clock a.m., on October 19, 2004, before the Honorable Gregory F. Kishel , in 228-B United States Courthouse, 316 North Robert Street, St. Paul, Minnesota, or as soon thereafter as counsel may be heard.
3. Any response to this motion must be filed and delivered not later than October 12, 2004, which is seven days before the time set for the hearing (including Saturdays, Sundays and holidays), or filed and served by mail not later than October 8, 2004, which is ten days before the date set for the hearing (including Saturdays, Sundays and holidays). UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.
4. This motion is filed pursuant to Bankruptcy Rule 4001 and Local Rules 9013-2 and 4001-1 and Movant requests relief from the automatic stay of 11 U.S.C. § 362(a) with respect to certain property subject to Movant's valid interest.

5. This case was filed as a voluntary case under Chapter 13 of the United States Bankruptcy Code, and the case is now pending in this Court. This Court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 1334 and 157(a), Local Rule 1070-1, Fed. R. Bankr. P. 5005 and applicable rules. This is a core proceeding.
6. By mortgage dated July 13, 2001, in the original principal amount of \$176,451.57 (the "Mortgage"), Movant acquired a mortgagee's interest in the following real property (the "Property"), to wit:

Lot Thirteen (13), Block Six (6), Thompson's Grove 2nd Addition, Washington County, Minnesota

and commonly known as 8538 Grospoint Avenue South, Cottage Grove, Minnesota
7. The Mortgage was filed for record in the offices of the Registrar of Titles for the above referenced county as Document No. 1103275. A copy of the Mortgage is attached hereto as Exhibit A.
8. At the time this case was filed there was a delinquency under the terms of the note secured by the Mortgage. The Chapter 13 Plan requires cure of this delinquency within a reasonable time. On information and belief, a delinquency exists with respect to payments due under the Plan to the Chapter 13 Trustee.
9. The Plan requires payment of post-petition mortgage payments directly to Movant when due. There is a delinquency with respect to post-petition mortgage payments due for the months of July 2004 through September 2004 in a total amount of \$4,176.00, plus interest and late charges.
10. The defaults under the terms of the Plan constitute cause, within the meaning of 11 U.S.C. § 362(d)(1), entitling Movant to relief from the automatic stay. Movant does

not have, and has not been offered, adequate protection of its interest in the Property.

11. If testimony is necessary as to any facts relevant to this motion, Paul Warder of Movant, 801 Marquette Avenue, Minneapolis, Minnesota, will testify on behalf of Movant.

WHEREFORE, Movant, respectfully moves the Court for an order modifying the automatic stay of 11 U.S.C. § 362(a) so as to permit Movant to foreclose its Mortgage on the Property, waiving Fed. R. Bankr. 4001(a)(3) to make the order effective immediately and for such other relief as may be just and equitable.

Dated: September 22, 2004

FOLEY & MANSFIELD, P.L.L.P.

By /s/ Ruth E. Honkanen

Thomas J. Lallier (#163041)

Ruth E. Honkanen (#175924)

Attorneys for Movant

250 Marquette Avenue, Suite 1200

Minneapolis, MN 55401

(612) 338-8788

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

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Sandra D. Smith,

Debtors.

MEMORANDUM OF LAW IN SUPPORT
OF MOTION FOR RELIEF FROM STAY

TCF National Bank ("Movant"), submits this memorandum of law in support of its motion for relief from the stay in the above-entitled matter.

FACTS

Movant holds a valid, duly perfected mortgage on certain real property. On the date this case was filed a delinquency existed under the note secured by the mortgage. The Chapter 13 Plan requires a cure of this default within a reasonable time. A delinquency in payments to the Chapter 13 Trustee exists under the Plan. The Plan requires payment of post-petition mortgage payments to Movant when due. There is a delinquency in respect to post-petition mortgage payments.

ARGUMENT

Under Section 362(d)(1) of the Bankruptcy Code, relief from the automatic stay shall be granted upon request of a creditor "for cause, including the lack of adequate protection of an interest in property of such [creditor]." 11 U.S.C. § 362(d)(1). A failure to make the payments required by the terms of the Plan has occurred. Such circumstances constitute

cause, within the meaning of Section 362(d)(1), justifying relief from the stay. First Federal Savings and Loan Association of Minneapolis v. Whitebread (In re Whitebread), 18 B.R. 192 (Bkrcty. D. Minn. 1982). In re Quinlan, 12 B.R. 516 (Bkrcty. W.D. Wis. 1981).

Accordingly, Movant is entitled to an order terminating the stay and authorizing it to foreclose its mortgage on the property.

Dated: September 22, 2004

Respectfully submitted,

FOLEY & MANSFIELD, P.L.L.P.

By /s/ Ruth E. Honkanen

Thomas J. Lallier (#163041)

Ruth E. Honkanen (#175924)

Attorneys for Movant

250 Marquette Avenue, Suite 1200

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09/21/2004 TUE 13:44 FAX 6123499859 foley & mansfield

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

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Case No. 04-32843 GFK

Mark R. Smith and
Sandra D. Smith,

Debtors.

VERIFICATION

I, Paul Warder, for TCF National Bank, declare, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed on: September 21, 2004.

Signed: Paul Warder
Paul Warder



Office of the
Registrar of Titles
Washington County, MN

Certified filed and/or recorded on:
2001/09/18 4:27:00 PM

1103275

Certificate #: 54087
Book #: 172 Page #: 108



Cindy Keenema
Registrar of Titles

Cindy Keenema

WASHINGTON COUNTY

Receipt No: 71261 Date: 08/06/2001
Registration tax hereon of \$405.84 Paid
MN Conservation Fund M.S. 473H \$5.00 Paid
Molly F. O'Rourke, Auditor by JBiedler

CONSUMER LOAN MORTGAGE

GAC/NORTH STAR EQUITY
TCF NATIONAL BANK **1073810**
MINNESOTA CONSUMER LENDING DEPARTMENT

Account Number: 099 - 068

NOTWITHSTANDING ANYTHING TO THE CONTRARY HEREIN, THE MAXIMUM PRINCIPAL
INDEBTEDNESS SECURED BY THIS MORTGAGE IS
ONE HUNDRED SEVENTY-SIX THOUSAND FOUR HUNDRED FIFTY-ONE AND 57/100 Dollars

(\$176,451.57).
This CONSUMER LOAN MORTGAGE ("Mortgage") is made this 13TH day of JULY, 2001, by
MARK R SMITH AND SANDRA SMITH AKA SANDY SMITH HUSBAND AND WIFE,
whose address is 8538 GROSPPOINT AV S, COTTAGE GROVE, MN 55016
(the "Borrower"), who grants, conveys, mortgages and warrants to TCF National Bank, a national banking
association, 801 Marquette Avenue, Minneapolis, MN 55402 (the "Lender"), land and property in
WASHINGTON County, Minnesota, described as:

LOT THIRTEEN (13), BLOCK SIX (6), THOMPSON'S GROVE 2ND
ADDITION

street address: 8538 GROSPPOINT AV S, COTTAGE GROVE, MN 55016
tax identification no. 1802721410022

together with all buildings, improvements, and fixtures on the property, whether now on the property or added in
the future, and all easements and other rights that pertain to the property (collectively the "Property"). This
Mortgage secures performance and payment under the terms of this Mortgage and Borrower's note dated the same
date as this Mortgage in the principal amount of
ONE HUNDRED SEVENTY-SIX THOUSAND FOUR HUNDRED FIFTY-ONE AND 57/100 Dollars
(\$176,451.57), subject to any written amendments to the note agreed to by Lender and Borrower ("Note"). In
addition to the indebtedness due under the Note, this Mortgage secures Protective Advances which may be in
excess of the maximum principal amount stated above with interest thereon (collectively "Debt") and the
performance of any covenants and agreements of the Borrower contained herein. "Protective Advance" means
amounts that may be advanced by the Lender to protect the Property or this Mortgage as to which no tax is due
under Minnesota Statute § 287.035. The full Debt, if not paid earlier, is due and payable on
08-01-2031. ☐ If the box preceding this sentence is checked, the interest rate under the Borrower's
Note is variable and can change daily, as described in the Note.

Borrower promises and agrees:

1. To keep the Property in good repair, and to also comply with all laws and ordinances, which affect the Property.
2. To pay all taxes, assessments, and water bills levied on the Property, and any other amounts which could become a Security Interest. "Security Interest" includes any lien, mortgages or other encumbrance.
3. To perform all obligations under any Security Interest on the Property. As of the date hereof, there exists no other Security Interest on the Property, other than as disclosed to Lender on the title search and report or other title evidence obtained by Lender prior to accepting this Mortgage, or on Borrower's loan application.
4. To keep the Property insured against fire, windstorm, flood, and such other hazards as Lender may require, in an amount and manner with companies acceptable to Lender, and with the proceeds made payable in the policies to Lender as mortgagee, and to deliver such proof of insurance as Lender may require. Lender will apply any insurance proceeds to pay the Debt, unless Lender agrees in writing that the proceeds can be used differently. If Lender uses the proceeds to reduce the Debt, Borrower will still have to make regular monthly payments until the Debt is satisfied. If Borrower fails to keep the Property insured, Lender may, but is not required to, obtain such insurance to protect Lender's interest. Such insurance obtained by Lender may not protect Borrower's equity interest in the Property. Lender is not required to obtain the lowest cost insurance that might be available.
5. That if all or part of the Property is condemned or taken by eminent domain, Borrower directs the party condemning or taking the Property to pay all of the money to Lender. Lender will apply the money to pay the Debt, unless Lender agrees in writing that the money can be used differently. If Lender uses the money to reduce the Debt, Borrower will still have to make regular monthly payments until the Debt is satisfied.
6. That if Borrower fails to pay or perform any of Borrower's obligations under this Mortgage, Lender may pay or perform such obligations. Any amount so paid and the cost of any title search and report made after any Default, may be added to the Debt.

7. That Lender shall have a power of sale. This means that if the Borrower is in Default, Lender is authorized and empowered to require immediate repayment of the Debt (called "acceleration"). Lender may (and is hereby authorized and empowered to) foreclose this Mortgage by auction or advertisement, pursuant to the statutes of the State of Minnesota in such case made and provided, power being expressly granted to sell the Property at public auction and convey the same to the purchaser in fee simple and, out of the proceeds arising from such sale, to pay the Debt with interest, and all legal costs and charges of such foreclosure and the maximum attorneys' fees permitted by law, with costs, charges and fees the Borrower agrees to pay.

However, before accelerating, Lender will send Borrower a written notice by certified mail which states:

- The promise that Borrower failed to keep or the representation or warranty that Borrower breached;
 - The action Borrower must take to correct that failure;
 - The date, at least 30 days away, by which the failure must be corrected;
 - That if Borrower doesn't correct the failure or the representation or warranty that Borrower breached, Lender will accelerate, and if Borrower doesn't pay, Lender or another person may buy the Property at a foreclosure sale;
 - That Minnesota law allows Borrower to reinstate the Mortgage after acceleration; and
 - That Borrower may bring suit in court to argue that all promises were kept and to present any other defenses Borrower has to acceleration.
- Lender need not send the notice if the promise Borrower failed to keep consists of Borrower's sale or transfer of all or a part of the Property or any rights in the Property without Lender's written consent. If Borrower does not correct the failure by the date stated in the notice, Lender may accelerate. If Lender accelerates, Lender may foreclose this Mortgage according to the Minnesota Statutes. Borrower gives Lender a power to sell the Property at a public auction. Borrower also agrees to pay Lender's attorneys' fees for the foreclosure in the maximum amount allowed by law. Lender may retain from the proceeds of the sale the amount of the Debt outstanding, the costs and charges of such sale, and reasonable attorney fees provided by Minnesota statute, and then render the surplus monies, if any, as required by law. In the event of any foreclosure or other sale under this Mortgage by virtue of judicial proceedings, advertisement, or otherwise, the Property may be sold in one parcel and as an entirety, or in such parcels, manner, or order as Lender in its sole discretion may elect.
8. That the term "Default" means (a) Borrower's failure to comply with the terms of this Mortgage; or (b) Borrower's failure to comply with the terms of the Note; or (c) Borrower's failure to comply with the terms of any Security Interest having priority over this Mortgage.
- The term "Lender" includes Lender's successors and assigns, and the term "Borrower" includes and binds the Borrower's, heirs, personal and legal representatives, successors, and assigns of the undersigned. If this Mortgage is signed by two or more persons, the obligations and security interest granted by this Mortgage shall be cumulative and in addition to any other remedies provided by law. Each person that signs this Mortgage is responsible for keeping all of the promises made by Borrower. Lender may choose to enforce its rights against any person signing this Mortgage or against all of them. However, if someone signed this Mortgage, but signed the Note as collateral owner only, then that person will not be required to pay any amount under the Note, but will have signed only to grant, convey, mortgage and warrant any rights that person has in the Property. Also, Borrower may agree to extend, modify, forebear, or make any accommodations with regard to the Note or Mortgage without such collateral owner's consent.
9. That Borrower shall not assign or transfer the Property or any beneficial interest in the Property by deed, land contract, or other instruments in any manner whatsoever, without Lender's prior written consent or unless authorized by applicable law.
10. That Lender or its agent may make reasonable entries upon and inspections of the Property. Lender shall give Borrower notice at the time of or prior to an inspection specifying reasonable cause for the inspection.
11. That if the loan secured by this Mortgage is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other loan charge is collected or to be collected in connection with the loan exceeds the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by reducing the outstanding Debt or by making a direct payment to Borrower. If a refund reduces the Debt, the reduction will be treated as a partial pre-payment, without any prepayment charge under the Note.
12. That this Mortgage, and any actions arising out of this Mortgage, are governed by Minnesota law to the extent not preempted by federal law. If any provision of this Mortgage is found to be unenforceable, all other provisions will remain in full force and effect. Lender's failure to exercise any right or remedy under this Mortgage will not waive Lender's rights in the future.

Borrower shall be given one conformed copy of the Note and this Mortgage.

BY SIGNING BELOW, BORROWER HAS SIGNED AND DELIVERED THIS MORTGAGE AS OF THE DATE FIRST WRITTEN ABOVE.

Borrower:

Mark R Smith
(signature)

MARK R SMITH
(type or very clearly print name)

Sandra Smith
(signature)

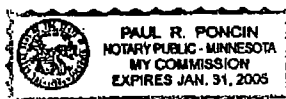
SANDRA SMITH AKA SANDY SMITH
(type or very clearly print name)

State of Minnesota
County of WASHINGTON) ss.

The above instrument was acknowledged before me this 13TH day of JULY, 2001, by
Mark R Smith and Sandra Smith, husband and wife
*AKA SANDY SMITH

Paul R Poncin
Notary Public
County,
My commission expires:

This Instrument Drafted by:
TCF National Bank
Consumer Lending Department
801 Marquette Avenue
Minneapolis, MN 55402



Unsworn Affidavit of Service

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

I, Jacquelyn J. LaVaque, declare under penalty of perjury that on September 22, 2004 , I mailed copies of the attached **Notice of Hearing and Motion for Relief From Stay, Memorandum of Law in Support of Motion, and proposed Order** by first class mail, postage prepaid, to each entity named below at the address stated below for each entity:

Mark R. Smith
Sandra D. Smith
8538 Grospoint Avenue S.
Cottage Grove, MN 55016

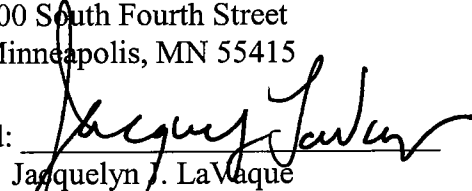
Jasmine Z. Keller
Chapter 13 Trustee
12 South Sixth St. #310
Minneapolis, MN 55402

Executed on: September 22, 2004

Robert J. Everhart, Esq.
PO Box 120534
New Brighton, MN 55112

U.S. Trustee
1015 United States Courthouse
300 South Fourth Street
Minneapolis, MN 55415

Signed: _____


Jacquelyn J. LaVaque
Foley & Mansfield, P.L.L.P.
250 Marquette Avenue
Suite 1200
Minneapolis, MN 55401

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Chapter 13
Case No. 04-32843 GFK

Mark R. Smith and
Sandra D. Smith,

Debtors.

ORDER GRANTING
RELIEF FROM STAY

The above-entitled matter came before the Court on the motion of TCF National Bank ("Movant") seeking relief from the automatic stay of 11 U.S.C. §§ 362(a) of the Bankruptcy Code. Appearances were noted in the court's record. The Standing Chapter 13 Trustee submitted a report and recommendation in response to the motion. Based upon the proceedings had on said date, the statements of counsel, and all of the files and records herein, the Court now finds that cause exists entitling Movant to the relief requested.

NOW, THEREFORE, IT IS HEREBY ORDERED that the automatic stay of 11 U.S.C. § 362(a) of the Bankruptcy Code are immediately terminated as to Movant, and Movant is authorized to foreclose its mortgage on the following real property:

Lot Thirteen (13), Block Six (6), Thompson's Grove 2nd Addition, Washington County, Minnesota

and commonly known as 8538 Grospoint Avenue South, Cottage Grove, Minnesota

Notwithstanding Fed. R. Bankr. 4001(a)(3), this order is effective immediately.

Dated: _____.

Gregory F. Kishel
United States Bankruptcy Judge